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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 72

JOHN VAN ALLEN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled case on March 31st, 1961.

Citation of Opinion and Judgment Below

The opinion of the Court of Appeals is not yet officially reported. It is printed in Appendix "A" hereto (*infra*, pp. 1a-3a).

The judgment of the United States Court of Appeals sought to be reviewed was dated and entered on the 31st day of March, 1961. It is printed in Appendix "B" hereto (*infra*, pp. 4a-5a).

Order on Motion for Rehearing

The order of the United States Court of Appeals, denying petitioner's application for a rehearing, was dated and entered on April 18, 1961. A copy of the Petition is printed herein in Appendix "C" (*infra*, pp. 6a-8a) and a copy of the order denying the Petition is printed herein in Appendix "D" (*infra*, p. 9a).

Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C., Section 1254 (1).

Question Presented

The question presented is:

Was petitioner, who was indicted on March 13, 1953, for an alleged attempt wilfully and knowingly to defraud and evade federal income taxes owed by him for the year 1946, and who was not brought to trial until September 1, 1960, denied a speedy trial, in violation of the Sixth Amendment of the Constitution of the United States.

The Constitutional Provision Involved

The Constitutional provision involved is the Sixth Amendment of the Constitution of the United States, which, insofar as here material, reads:

> "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial * * * "

Statement of the Case

The chronology is as follows (P.A. 1a-4a; G.A. 5a, 11a*):

March 1947:	Petitioner's income tax return for 1946 filed.
March 13, 1953:	Petitioner indicted.
August 5, 1953:	Government's Bill of Particulars filed.
March 3, 1954:	Case marked "off calendar".
September 10, 1959:	Case restored to calendar.
February 19, 1960:	Petitioner's motion to dismiss for failure to prosecute denied.
September 1, 1960:	Trial commenced.

Thus we have a lapse of a few days less than six years between the time of the commission of the alleged offense and the indictment; a lapse of upwards of seven years between the date of indictment and the date of trial; and a lapse of upwards of thirteen years between the date of the offense and the date of trial.

It is undisputed that petitioner's income tax return for 1946 was erroneous in substantial respects.

Only one issue was created at the trial, i.e., were the errors committed by petitioner, and, if so, were they "wilful and intentional."

The resolution of this issue depended on whether or not the errors were attributable to one Kubik, the individual to whom, admittedly, petitioner turned over his records for

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* Unless otherwise indicated by the context, numbers in parentheses refer to pages in the Appendeses printed for the Court of Appeals. "P.A." denotes the Appendix printed by petitioner here, as appellant in the Court of Appeals; "G.A." denotes the Government's Appendix in that court.

preparation of his return, or were they due to the intentional and wilful withholding or misstatements of facts by petitioner to Kubik.

Kubik testified that until his retirement on pension in 1957, he had been in the "Government service close to forty years," and that since 1921 he had been an Internal Revenue Agent, with experience which included income taxes (P.A. 14a-15a); that petitioner had turned over to him petitioner's data relating to his returns for 1944 and 1945 and, without compensation, Kubik had "assembled" it and prepared defendant's returns for those years (P.A. 15a-16a). Kubik testified further that petitioner consulted Kubik late in February or early March 1947 about the preparation of petitioner's return for 1946, and turned over to Kubik his, petitioner's, brokers' statements, confirmations, bank statements, cancelled checks, hotel bills, plane travel bills, and other data relating to petitioner's income and expenses during the year 1946 (P.A. 15a, 17a); that from this data Kubik assembled his facts and made his computations on 14 column "worksheets", i.e., Exhibits 26 and 27—one of which alone consists of 44 pages (P.A. 19a-21a; G.A. 27a); that after working on the data for ten days to two weeks (P.A. 28a) he, Kubik, came to the conclusion that the data was too voluminous for him to prepare the return in time for filing, and he therefore suggested to petitioner that petitioner have the job completed by a Certified Public Accountant (G.A. 55a-56a); that petitioner, acting on this suggestion, arranged with one Pines, a Certified Public Accountant, to take over and complete the work (P.A. 28a), and that thereupon, pursuant to petitioner's instructions, he, Kubik, conferred with Pines (G.A. 58a), who then assigned the matter to one of his employees, Falb (P.A. 90a).

Pines and Falb testified that when Pines instructed Falb to prepare petitioner's return, Falb demurred, pointing out that the return would be due in five or six days from that time and that the office was very busy getting out other

returns which had to be filed (P.A. 68a, 70a, 71a; G.A. 83a-84a); that Pines then told Falb that the preparation of petitioner's return would not take long because petitioner's "accountant"—referring to Kubik (P.A. 90a)—would give Falb all the figures and Falb would merely have to transfer them to their appropriate places in the return (P.A. 70a, 71a; G.A. 88a-89a).

Kubik testified that he had three or four conferences with Falb (P.A. 34a; G.A. 58a); that at this time his, Kubik's, worksheets were complete, and that he turned all the data he received from petitioner, together with his, Kubik's, worksheets, over to Falb (P.A. 29a, 33a-34a).

Both Falb and Kubik testified that there was insufficient time to permit of Falb's checking the data and the computations therefrom made in Kubik's worksheets: all they had time to do, and all they did, was to have Kubik call off to Falb, from the worksheets, the figures which Kubik said were to go into the return, and that Falb made out the return accordingly (P.A. 30a, 72a; G.A. 59a, 84a, 91a, 94a-95a). There is no claim that petitioner participated in any way.

In calling off these figures to Falb, Kubik testified, he omitted all reference to various transactions appearing on his worksheets because, said Kubik, petitioner had told him, in response to inquiries he made of petitioner in the course of the preparation of the worksheets, that these were uncompleted transactions (G.A. 25a, 31a, 33a-34a, 36a-38a, 42a-43a, 47a-51a), and therefore not includable in the computation of his income (G.A. 31a, 59a). This was the only testimony that petitioner was in any way responsible for the omissions of said transactions from his income tax return.

It then developed that Kubik had given several Question and Answer statements as far back as 1953, i.e., some seven years closer to the event, in which he had said precisely the contrary.

Kubik admitted that in a statement taken from him in 1953 by petitioner's then attorney, one Dickinson, Kubik had been asked the following questions and had given the following answers (P.A. 33a):

"Q. Would the items you left out for that reason account for the shortage in the declaration of Mr. Van Allen's income? A. That is something that I can't tell you definitely, because when I didn't match one against the other, that is, a buy or a sale, in my opinion it wasn't a completed transaction."

[id. 34a]:

"Q. Are you convinced that as far as you are concerned, everything was disclosed in the way of Mr. Van Allen's business transactions? A. I see no reason why everything should not have been disclosed, and if anything was omitted, to me it appears to be an oversight."

[id. 56a]:

" 'Q. If these yellow work sheets show that 307,000 shares of Beaulieu stock were either purchased or sold, Mr. Falb would have had that information, is that correct? A. In other words, if he computed the tax properly—he had all the information that he could have confirmed against brokerage statements and brokerage confirmations.'

"Did you give that answer? A. Possibly so; yes sir."

[id. 56a]:

"Q. Were you asked this question: 'Q. Did the information that you have posted here on these yellow work sheets come from the white sheets'—being Government's Exhibit 25? 'A. Originally they were started on the yellow sheets. As far as my memory goes back, I believe, they were transcribed on to the white sheets. If they are not on the white sheets, then they are on the yellow sheets. Everything that you have shown me here was left with Mr. Falb. If Mr. Falb had computed the tax properly, there would have been no difficulty. They are only temporary work sheets. If he had

done the proper job and went through and confirmed the information there, the basic information that I computed up to the point that I turned the information over to him, he could have most naturally computed the proper tax due or whatever tax was due.' "

Kubik also gave statements to Special Agents of the Government, Maher and Kuhn in 1953 (P.A. 43a). He admitted that on that occasion he was asked the following questions and gave the following answers (id. 45a-46a):

" 'Q. All I want to know is whether Mr. Van Allen had explained to you where the stock that was delivered out or delivered in went or where it came from.'

Do you remember that question? And you answered: 'None other than what I had gathered from the confirmations and the brokerage statements.' A. May I look at that?"

• • •

"Q. Mr. Kubik, I merely asked you whether you were asked that question and if you gave that answer at that time. A. I was asked a question and I gave an answer at that time, yes, sir.

"Q. And that is the answer you gave, is that so? A. That's the answer I gave at that time, yes, sir.

• • •

'Q. And you never asked him [meaning Van Allen —about these deliveries in and out? A. No, sir.'

That is true? A. At that time, yes, sir, that was my answer at that time."

[id. 46a]:

" 'Q. If on these brokerage statements you saw a transaction which did not represent a buy or sell did you inquire of Mr. Van Allen what these credits or debits might represent?"

And your answer was: 'No'.

Were you asked that question and did you give that answer? A. I gave that answer at that time."

Early in 1953 Kubik was interviewed by Brown, a Washington attorney, who then represented petitioner (id. 59a). Brown testified at the trial herein, as follows (id. 61a-62a):

"Q. Just tell us what he said. A. I inquired of him the reason why these Beaulieu transactions had not been taken into consideration in the preparation of the return, and he said that insofar as they showed receipts and deliveries on this sheet it was his construction of the transaction that they were not sufficiently complete to represent a taxable transaction.

Q. And that is what he told you? A. That is precisely what he told me."

Thus, although Kubik testified at the trial in late 1960 that the notations "leave out" or "omit" or "incomplete transaction" were written on his worksheets in 1947 because petitioner told him to do so at that time, Kubik told Dickinson in 1953 (P.A. 33a) that he made these notations on his worksheets because, when a buy order "did not match" against a sell order in the broker's statements, "in my opinion" it "wasn't a completed transaction", and he told Kuhn (P.A. 45a-46a) that he "gathered" that information "from the confirmations and the brokerage statements", and not as the result of any inquiries he made about them of petitioner (P.A. 46a, 67a). The information Kubic gave to Brown in 1953 was to the same effect (P.A. 61a-62a). Again, Kubik told Dickinson in 1953 that the information contained in his computations which he turned over to Falb contained all the information from which Falb should have "computed the tax properly" if he had done "a proper job" (P.A. 56a).

So that petitioner has been convicted of wilfully and intentionally omitting income from his 1946 income tax return solely on Kubik's testimony at the trial that petitioner had told him to make such omissions in the course of Kubik's preparation of his worksheets some thirteen years previously—and this, although Kubik admitted (a) that on several occasions, seven years previously, he had told four different investigators, two on behalf of petitioner and two on behalf of the Government, that he had not received any such instructions from petitioner; and (b) that

at the time of trial he had no independent recollection of his alleged conversations with petitioner, and had constructed his testimony as to petitioner's alleged directions some thirteen years previously solely from the fact that he found, on examining his worksheets about a month before the trial, that he had written opposite some of the items thereon the words "leave out", "omit", etc.

Reasons for Granting the Writ

Petitioner respectfully submits that the writ should be granted because of the conflict which exists among United States Courts of Appeal as to: (a) whether or not it is incumbent on a defendant in a criminal case to show "prejudice" from the Government's failure to accord him a speedy trial; and (b) whether or not a defendant, by failure to move for an early trial, waives his constitutional right to a speedy trial and the right to assert it later in attacking his conviction.

Although the delay in this case is probably unprecedented in income tax cases, the Government presents no adequate reason for it. The only excuses it offered are: (a) that between September 1959 and the beginning of January 1960—a period of about four months commencing thirteen years after the alleged crime, and upwards of seven years after the indictment—the trial was adjourned because petitioner's attorney was engaged elsewhere (G.A. 5a); and (b) that pursuant to an order it procured on January 25, 1960, the Government was engaged in taking testimony in Canada until some time in May 1960 (G.A. 5a-7a).

It needs no argument to show that the taking of testimony by commission, pursuant to an application not made by the Government until January 25, 1960, cannot serve as an excuse for the Government's delay in bringing to trial a case in which the indictment was filed seven and a half years previously.

Similarly, the adjournment of the case between September 1959 and January 1960 because of petitioner's attorney's engagement elsewhere cannot excuse the failure of the Government to bring petitioner to trial in the six and a half years which had elapsed prior thereto—particularly where the Government had seen fit to let the case remain "Off Calendar" from March 1954 until September 10, 1959 —a period of five and a half years immediately prior thereto.

There is a conflict between the Courts of Appeal in reference to the need of showing "prejudice" from the delay, in order for a defendant to avail himself of the protection of the Sixth Amendment.

In affirming the judgment of conviction here, the learned Court of Appeals followed its own opinion in *Lustman*, 258 Fed. 2d 475, cert. den. 358 U. S. 886 (1958). In that case defendant was brought to trial in November, 1956, on an indictment filed August 29, 1951—a delay of somewhat over five years.

The court found that four years of the delay were attributable to the Government, and that this constituted "undue delay." Answering the Government's contention that the defendant had failed to demonstrate that the delay had prejudiced him in his defense, the Court said (pp. 477-8):

> "* * * although we agree, we think that a showing of prejudice is not required where a criminal defendant is asserting a constitutional right under the Sixth Amendment."

On the other hand, in *King* v. *United States*, 265 Fed. 2d 567, the Court of Appeals for the District of Columbia, in affirming a conviction, said (p. 570):

> "The defendant's case was not prejudiced, even though he may have suffered hardship for the delay."

Though the court also adverted to the fact that a motion to advance the date of trial "was always available," it is apparent from the opinions of the four dissenting judges that the lack of "prejudice" from the delay was a motivating reason for the affirmance. Thus BAZELON, *J.*, writing for the minority, said at p. 573 (italics by the Court):

> "Even if no agency of Government is responsible for the delay, where there has *in fact* been a substantial delay not of defendant's own choosing—i.e. where he has not waived his right to a speedy trial—there has *in law* been a denial of a speedy trial. * * *
>
> "I agree with the conclusion in *Provoo* that 'prejudice is presumed, or necessarily follows, from long delay' * * * "

In *U. S.* v. *Gunther*, 259 Fed. 2d 173, the Court of Appeals for the District of Columbia, in affirming a dismissal for unnecessary delay in bringing defendant to trial, said (p. 174):

> "We do not hold or mean to intimate that, generally speaking, motions to dismiss for delay are to be granted in the absence of prejudice"—

whereas, as shown above (p. 10), the Second Circuit holds that "a showing of prejudice is not required."

Kubik's change in his testimony, seven years after he had given several statements exculpating petitioner, can be attributed only to the operation of time on his memory.

Kubik did not pretend to have any independent recollection of any instruction or advice by petitioner to "leave out", "omit", etc. These alleged instructions, he admitted, were inferred by him solely from notations he found on the worksheets he made thirteen years before he testified, but the words he refers to did not say that petitioner gave him any such instructions. They said merely "leave out", "omit", etc.—just the type of notation one who is checking data preparatory to making out an income tax return would naturally make for his own information

and use as he checked out transactions in the data furnished to him—which is precisely what, seven years before the trial, Kubik told four different investigators he had done.

It is submitted that one's liberty may not be staked on such testimony. As Judge Fahy said in his dissent in *Askins*, 231 Fed. 2d 741 (C. C. A., D.C. 1956) on page 747:

> "• • • several of the witnesses stated that they had no independent recollection of the events about which they were testifying, but had to rely on reports and records. • • • While the delay was not the fault of the United States • • • and was due primarily to the insanity of the accused, there was not a speedy trial in fact, and I think it follows in the circumstances here disclosed that there was not a speedy trial in law."

There can be no doubt that petitioner was seriously prejudiced because of the effect of the delay on Kubik's recollection of the events of upwards of thirteen years ago. Thus, after he had testified that his work sheets refreshed his recollection that the omitted transactions were left out pursuant to instructions from petitioner, Kubik's attention was called to the statement he made to Special Agent Kuhn in 1953, as follows (P.A. 67a):

> "'Q. Did you ever inquire of Mr. John Van Allen and Mrs. Mercedes Van Allen what happened to the stock that was delivered out which did not represent a sale or where he might have gotten stock which was delivered into the account which did not represent a purchase? Did you ever ask Mr. Van Allen where the stock went to or where the stock came from? A. No, sir, as I had nothing to do with the final determination of the return I felt that the accountants—'"

After Kubik admitted, reluctantly, that he had given that statement to Special Agent Kuhn in 1953, he testified as follows:

> "Q. Therefore, when you testified here that you inquired of Mr. Van Allen concerning the stock which

> was delivered or received, which is recorded on your work sheets, you did not tell us the truth, did you? A. No. I could have been mistaken."

Common experience is entirely in accord with what the Court said in *U. S. v. Chase*, 135 Fed. Supp. 230 (U. S. D. C., N. D. Ill. E. D., 1955) at page 233:

> "Even if two decades have left them [witnesses] alive and within the jurisdiction of this court, certainly their memories of those long past events are clouded. They could not be said after that length of time to be testifying to what they remember; they would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection. The human mind is so constructed that remembrance of even the sharpest experiences dulls with time. Witnesses, however honest, could not respond with any accuracy to cross-examination, and another important right would thus be lost to petitioner."

We submit that no individual's liberty should be permitted to stand or fall upon the risk of a witness' alleged recollection of a conversation thirteen and a half years prior to the trial, and this is particularly true where the witness admits, as Kubik did here, that (a) he had no independent recollection of the alleged conversation, and (b) he assumed to reconstruct it from notations made by him thirteen and a half years before, which notations, in fact, contain no reference to, or suggestion of, any such conversation, and (c) the witness admits that, seven years before the trial he gave statements to four different individuals on three different occasions, in each of which he had said there had been no such conversation, and (d) he admits that in his testimony at the trial contrary to his said earlier statements "I could have been mistaken."

There is also a conflict among the Courts of Appeal on the question of the effect of a defendant's failure to move for trial upon his right to claim a violation of his right to a "speedy trial" under the Sixth Amendment.

Petitioner here moved, in advance of trial, for a dismissal because of the Government's delay in bringing him to trial. The motion was denied by District Judge KAUFMAN on the authority of cases like *Lustman* (P.A. 1a-3a). The point was raised again at the beginning of the trial (P.A. 13a); it was made again at the close of the Government's case (P.A. 84a-86a); still again at the end of the entire case (P.A. 93a-94a), and in arrest of judgment after the finding of guilt (R. 1201).

In *Lustman*, 258 Fed. 2d 475, cert. denied 358 U. S. 880 (1958), the Court of Appeals for the Second Circuit, though it held defendant need not show prejudice from the delay, affirmed the conviction on the ground that a speedy trial is a "personal right of the defendant" and is deemed waived if not promptly asserted. In the instant case, the Court of Appeals said (Appendix A, p. 3a):

> "Moreover, appellant concedes that at no time subsequent to the indictment did he demand an earlier trial; and we held in *U. S. v. Lustman*, 258 Fed. 2d 475 (2 Cir.), *cert. denied*, 358 U. S. 880 (1958), that an accused who failed to make such a demand waived his constitutional right, and could not later assert it in attacking his conviction. We find nothing in this case to distinguish it from *U. S. v. Lustman*, supra, and affirm the conviction below."

There were, in fact, several distinguishing features between this case and *Lustman*. Here petitioner moved to dismiss for failure to grant him an early trial; his motion was made shortly after the Government, on September 10, 1959, indicated, by restoring the case to the calendar, that it intended to reactivate the case after having permitted it to remain "off calendar" for five and one half years. That motion was denied by KAUFMAN, *U.S.D.J.* on February 19, 1960 (G.A. 1a-3a).

In *Lustman* the time between the offense and the trial was nine years, whereas here it was thirteen and one-half

years. In *Lustman* there was no suggestion that time had dulled the memory of any of the witnesses, whereas here the conviction stands on a complete reversal at the trial of statements made seven years before by the only witness to the alleged offense. Moreover, in *Lustman*, the period between indictment and trial was about five years, of which the court found defendant, by motions and appeals and other activities, was responsible for about *eighteen months*, whereas here the period between indictment and trial was seven and a half years, of which defendant, even on the Government's own statement (G.A. 5a) was responsible "for nearly *four months*".

In *U. S. v. Dillon*, 183 Fed. Supp. 541 (U. S. D. C., S. D. N. Y., April 22, 1960), Judge WEINFELD said (p. 543):

> "On the issue as to whether or not these defendants have waived their right, their constitutional right, to a prompt trial, the Court is not unaware of the ruling in this Circuit in United States v. Lustman, 258 F. 2d 475. This case referred to United States v. Kaye, 251 F. 2d 87, where a similar contention was made by the Government and upheld by the Court of Appeals. But in the Kaye case, the Court specifically noted (1) that the indictment was only four and a half years old at the time it was brought to trial; and (2) 'No motion was made by defendant at the beginning of trial for dismissal because of delay'.
>
> In this case such a motion has been made. Indeed, the defendants urge they made this motion orally in the Calendar Part some six weeks ago, but there seems to be some dispute about this."

Such a motion, as previously noted, was made here shortly after the Government restored the case to the calendar, following its inaction of six and a half years, during five and a half of which the Government permitted the case to languish "off calendar".

Continuing in *Dillon*, Judge WEINFELD, after referring to the fact that there was "some dispute" as to whether or not a motion to dismiss because of delay had been made before the beginning of the trial, said (p. 543):

> "Be that as it may, I do not conceive it to be the duty of a defendant to press that he be prosecuted upon an indictment under penalty of waiving his right to a speedy trial if he fails to do so. It is the duty of the public prosecutor, not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to a speedy trial."

In *Pollard* v. *U. S.*, 352 U. S. 354 (1956), the Court had undertaken, by a new sentence, to correct an erroneous one which had been imposed two years previously. Defendant claimed, among other things, that the second sentence was part of the trial, and that he had therefore been deprived of a speedy trial in violation of his rights under the Sixth Amendment. This Court said (p. 361) that it would assume, *arguendo*, that sentence is part of the trial for the purpose of the Sixth Amendment, and addressing itself to defendant's contention, the Court said (pp. 361-2):

> "Whether delay in completing a prosecution such as here occurred amounts to an unconstitutional deprivation of rights depends upon the circumstances. See, e.g., Beavers v. Haubert, 198 U. S. 77, 87; Frankel v. Woodrough, 7 F. 2d 796, 798. The delay must not be purposeful or oppressive. It was not here. It was accidental and was promptly remedied when discovered. Nothing in the record indicates any delay in sentencing after discovery of the 1952 error."

Certainly it cannot be said that the Government's delay here was not "purposeful", or that it was "accidental". Even the Government has never so claimed.

In a footnote in *Pollard*, the Court said (p. 362):

> "We note that petitioner made no motion to secure a prompt proper sentence, often considered important in questions involving the Speedy Trial Clause. See cases cited in Petition of Provoo, 17 F.R.D. 183."

This footnote, coupled with the Court's statement that whether or not delay amounts to an unconstitutional deprivation of rights "depends upon the circumstances," would seem to make it clear that failure to move, without more, would not result in a waiver. Here there was a motion before trial. Moreover, even if that be disregarded, there was nothing on petitioner's part, other than inaction up to the time of making that motion, which indicated any intention on his part to waive his right to the protection of the Sixth Amendment.

Waiver, of course, is the *intentional* relinquishment of a known right, and where it is claimed as to a constitutional right, it will not be "presumed"; indeed "every reasonable presumption is indulged against" it (*U. S. v. Dillon*, 183 Fed. Supp. 541, 543; *Glasser v. U. S.* 315 U. S. 60, 67).

In affirming the conviction in *King*, 265 Fed. 2d 567 (U. S. C. A., D. C.), the majority, after pointing out that defendant's case had not been "prejudiced" by the delay, observed (p. 570):

> "Of course, a motion to advance the date of trial was always available."

It is not clear whether, if the majority had found that defendant had been prejudiced by the delay, the failure to move for a speedy trial would have been deemed sufficient to preclude reversal. In any event, it is clear from the opinion of the four dissenting Judges that they were for reversal on the ground of delay, even though no motion to speed the trial had been made.

In *United States* v. *Chase*, 135 Fed. Supp. 230 (U. S. D. C., N. D. Illinois, E. D., 1955), defendant was indicted for one murder on November 27, 1934, and for another murder committed at the same time and place he was indicted on January 28, 1935. He was tried on one of the indictments and sentenced to life imprisonment in March 1935. In April 1955, he moved for a speedy trial of the remaining indictment or, in the alternative, for its dismissal. The court said (p. 231):

> "It is not disputed that Chase at no time before the filing of this motion asked the court for a trial; and it is the government's position that the right to a speedy trial is waived if no positive demand is made."

Referring to the Government's said contention, and to the cases cited by the Government in support of it, the court said (p. 231):

> "These opinions state in general terms that unless demand is made for it, the right to a speedy trial is forfeited. Analysis of them, however, shows that each involved an action in avoidance or delay of trial more positive than mere silence or inaction."
>
> "These cases, and others like them, are based on the logical thought that 'Delays which have been caused by the accused himself can not, of course, be complained of by him.' *Shepherd* v. *United States* supra, 163 F. 2d at page 976."
>
> "The evidence produced at the hearing did not bring the instant situation within the spirit of these cases, since it failed to show that Chase took any action to avoid or delay trial."

It is submitted that there can be no such finding here either. From March 3, 1954, when the case was marked "off calendar", the Government showed no disposition to take any further proceedings in it. The case was permitted to remain in that dormant condition until September 10, 1959—a period of five and one half years. It was only

natural, in these circumstances, for petitioner to conclude that the Government had abandoned the prosecution, and that there was no occasion to move for a trial, speedy or otherwise.

Our research had turned up no precedent for permitting the Government to reactivate a case which it has permitted, without excuse or justification, to remain "off calendar" for such an extended period, particularly where the result has been to delay the trial until thirteen and a half years after the alleged offense and seven and a half years after indictment.

We submit that what Judge WEINFELD said in the *Dillon* case (183 Fed. Supp. 541, U. S. D. C., S. D. N. Y., April 1960) applies *à fortiori* here, i.e. (p. 543):

> "Be that as it may, I do not conceive it to be the duty of a defendant to press that he be prosecuted upon an indictment under penalty of waiving his right to a speedy trial if he fails to do so. It is the duty of the public prosecutor, not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to a speedy trial."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JESSE CLIMENKO,
Counsel for Petitioner.

New York, May 11, 1961.

[APPENDICES FOLLOW]

Appendix A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 289—October Term, 1960.

(Argued March 6, 1961 Decided March 31, 1961.)

Docket No. 26596

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN VAN ALLEN,

Defendant-Appellant.

Before:

WATERMAN, MOORE and FRIENDLY,

Circuit Judges.

Appellant seeks reversal of conviction below, United States District Court for the Southern District of New York, Murphy, *J.*, without jury, on ground that ~~denial of pre-trial motion to dismiss indictment, Kaufman, *J.*, was error inasmuch as~~ appellant's right to speedy trial under Sixth Amendment to United States Constitution was denied him. Conviction affirmed.

Appendix A

MORTON S. ROBSON, United States Attorney, Southern District of New York (Gideon Cashman, George I. Gordon, Assistant United States Attorneys, of counsel), *for Appellee.*

BRUNO SCHACHNER, New York City, *for Defendant-Appellant.*

PER CURIAM:

Appellant, John Van Allen, was indicted in the United States District Court for the Southern District of New York for wilfully and knowingly attempting to defeat and evade a large portion of the income tax due and owing by him to the United States for the calendar year 1946. The one-count indictment charged that on or about March 15, 1947, the defendant caused a false and fraudulent income tax return to be filed in violation of Section 145(b) of the Internal Revenue Code of 1939. The indictment was filed on March 13, 1953, just before the statute of limitations would bar a prosecution. On March 3, 1954 the case was marked off the trial calendar. Six years later, on September 10, 1959, it was restored. Thereafter, defendant, relying on the Sixth Amendment, on February 9, 1960 moved, pursuant to Rule 48(b) of the Federal Rules of ~~Civil~~ Criminal Procedure, for an order dismissing the Government's case for its failure to prosecute. This motion was denied on February 19, 1960. In due course, on September 1, 1960, trial commenced before Judge Murphy, as trier of the facts, the defendant having waived his right to a trial by jury. Appellant was found guilty.

On the appeal the appellant makes no claim of error in the conduct of the trial or of lack of evidence to support

the decision of the trial judge. He contends that the delay of seven and one half years between the filing of the indictment and the trial deprived him of his Sixth Amendment right to a speedy trial, and that therefore the court below erred when it denied the motion to dismiss the indictment. He claims further aggravation because of the six year delay between the commission of the unlawful acts and the filing of the indictment, but his own conduct was largely responsible for this. Moreover, appellant concedes that at no time subsequent to the indictment did he demand any earlier trial; and we held in *United States* v. *Lustman*, 258 F. 2d 475 (2 Cir.), *cert. denied*, 358 U. S. 880 (1958), that an accused who failed to make such a demand waived his constitutional right and could not later assert it in attacking his conviction. We find nothing in this case to distinguish it from *U. S.* v. *Lustman*, *supra*, and affirm the conviction below.

Affirmed.

Appendix B

Judgment of Affirmance

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the thirty-first day of March one thousand nine hundred and sixty-one.

Present:

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN VAN ALLEN,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix B

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro,
Clerk.

By Niall F. O'Doherty,
Chief Deputy Clerk.

Appendix C

Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, *Appellee.* —*against*— JOHN VAN ALLEN, *Defendant-Appellant.*	C141-129

TO THE HONORABLE, THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Pursuant to Rule 25 of the Rules of this Court, Appellant respectfully petitions for a rehearing of his appeal on the grounds hereinafter set forth, the opinion of this Court having been filed herein on March 31, 1961:

1. Appellant submits that the opinion of this Court indicates that the issue tendered on the appeal has apparently not been resolved for the following reasons:

a. The opinion states that the appeal was based "on ground that denial of pre-trial motion to dismiss indictment, Kaufman, J., was error".

Judge Kaufman denied the pre-trial motion on the ground that it was unpredictable whether a witness would, in fact, be unavailable. At the trial, the witness actually testified for appellant so that that point had

become moot, as conceded by us on page 12 of our main brief. We claimed no error with respect to the disposition of the pre-trial motion as such did not constitute a ground of appeal.

b. While we did not challenge the sufficiency of the evidence, we challenged in a sense, the conduct of the trial, for we claimed error based on the denial by the trial judge of the various motions to dismiss.

c. The opinion states that appellant contended "that the delay" deprived appellant of his Sixth Amendment right to a speedy trial. On page 12 of our main brief, we conceded that delay alone does not entitle us to prevail. We contended that delay, *coupled with prejudice* (which became apparent only at the trial), entitled us to dismissal of the indictment or judgment of acquittal.

We suggested that "prejudice" is an exception to the rule of *United States v. Lustman*, referred to in the opinion. See p. 22 of main brief, and reply brief, p. 10. According to the Court of Appeals for the District of Columbia, the exception applies if "the possibility of serious prejudice existed" (main brief, p. 10), or the Government failed to prove "that the accused suffered no serious prejudice" (main brief, p. 18). This was the sole issue on this appeal.

Respectfully submitted,

BRUNO SCHACHNER,
Attorney for Defendant-Appellant

Dated: New York, New York
April 7, 1961

Appendix C

CERTIFICATE OF COUNSEL

BRUNO SCHACHNER hereby certifies:

That he argued the within appeal for appellant before this Court.

That he is familiar with all of the prior proceedings had in this matter.

That he has read and is familiar with the petition for rehearing herein.

That said petition is made and filed in good faith to request the Court's rehearing of the matters therein specified and is not filed for any purpose of delay.

BRUNO SCHACHNER

Appendix D

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of April, one thousand nine hundred and sixty-one.

Present,

HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN VAN ALLEN,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. DANIEL FUSARO,
Clerk.

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Office-Supreme Court, U.S.
FILED
JUN 15 1961
JAMES R. BROWNING, CLERK

No. 72

In the Supreme Court of the United States

OCTOBER TERM, 196

JOHN VAN ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
LOUIS F. OBERDORFER,
Assistant Attorney General,
JOSEPH M. HOWARD,
LLOYD J. KEIGO,
Attorneys,
Department of Justice, Washington 25, D.C.

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597939—61

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 970

JOHN VAN ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's memorandum opinion (P.A. 8a–10a)[1] is not reported. The opinion of the court of appeals (Pet. 1a–3a) is reported at 288 F. 2d 825.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1961 (Pet. 4a–5a). A petition for rehearing was denied on April 18, 1961 (Pet. 9a). The petition for a writ of certiorari was filed on May 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "P.A." refers to the petitioner's (there, appellant's) appendix in the court of appeals; "G.A.", to the government's appendix.

QUESTION PRESENTED

Whether petitioner waived his right to a speedy trial under the Sixth Amendment by failing to request an earlier trial or to resist any postponement of trial.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States:

Sixth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *.

STATEMENT

Petitioner was indicted on March 13, 1953, for wilfully attempting to evade income taxes by filing a false and fraudulent return for the year 1946. The return as filed showed net income of $49,862 and a tax due of $24,010; the indictment charged an understatement of income by $76,145 and of tax by $59,895 (P.A. 1a, 6a, 7a). After a trial to the court,[2] petitioner was found

[2] The understatement of income was not contested at the trial (see Pet. 3) and consisted primarily of the omission of short-term capital gains from sales of 76,000 shares of Beaulieu Yellowknife Mines, Ltd., stock. The shares were first transferred from an account petitioner maintained with a Toronto, Canada, broker into three other accounts: an account maintained in Montreal in the name of a nominee; an undetermined third-party account in Toronto; and an account with another broker in Toronto in petitioner's own name. The stock was then sold from those accounts (G.A. 112a–124a, 134a–135a, 174a–176a).

The defense was that the omissions were not wilful but resulted from an error by one Kubik, an acquaintance of petitioner's who prepared worksheets from the data given him by petitioner and then, from the worksheets, furnished petitioner's

guilty and was sentenced to imprisonment for a year and a day (P.A. 11a–12a). The court of appeals affirmed (Pet. 1a–3a).

The chronology of events on which petitioner's claim of a denial of a speedy trial is based is as follows (P.A. 1a–6a; G.A. 5a, 11a):

> March, 1947: 1946 return filed.
> March 13, 1953: Indictment returned.
> March 3, 1954: Case marked "off calendar."
> September 10, 1959: Case restored to calendar.
> February 19, 1960: Motion to dismiss for failure to prosecute denied.
> September 1, 1960: Trial commenced.

In denying the motion to dismiss for failure to prosecute, the district court stated (P.A. 9a):

> Upon oral argument of the instant motion, counsel for the defendant admitted that no effort of any kind had been made by the defendant prior to the date this motion was filed to expedite bringing his case to trial. The "marking off" was done with the full knowledge, and undoubtedly acquiescence, of the defendant with the information that was to go on the return.

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accountant with the (whose identity petitioner had concealed from the revenue agents until the eve of the indictment, G.A. 103a–107a, 110a–111a) testified that, being unable to trace the final disposition of the 76,000 shares delivered out of the original records given him by petitioner, he had asked petitioner about the transaction and had been told that it was uncompleted and should be left out of the return (G.A. 29a–54a, 66a–67a, 70a, 72a–79a). Despite vigorous cross-examination based on an inconsistent statement made when he was first questioned by investigators, and before he had an opportunity to examine his worksheets, the witness adhered to his testimony (P.A. 32a–56a, 63a–68a; G.A. 63a–67a, 70a, 72a) and it was evidently accepted by the trial judge.

> fendant, and there is no suggestion that at any time during the pendency of this action the defendant was unaware of the status of his case or unable to make the necessary expediting motions. * * *

The court concluded that petitioner, by his inaction and acquiescence, had waived any right to object to the delay as violating his rights to a speedy trial under the Sixth Amendment. Additionally, the court found that no showing of prejudice had been made to justify a discretionary dismissal of the indictment under Rule 48(b) of the Federal Rules of Criminal Procedure.

ARGUMENT

It is settled law that a defendant, competent to do so, who takes no action to precipitate trial or to resist postponement thereby waives any objection to the delay and may not thereafter upset a conviction on the ground that he was denied a speedy trial.[3] As

[3] *E.g.*, *United States* v. *Lustman*, 258 F. 2d 475 (C.A. 2), certiorari denied, 358 U.S. 880; *United States* v. *Kaye*, 251 F. 2d 87 (C.A. 2), certiorari denied, 356 U.S. 919; *Pietch* v. *United States*, 110 F. 2d 817 (C.A. 10), certiorari denied, 310 U.S. 648; *Worthington* v. *United States*, 1 F. 2d 154 (C.A. 7), certiorari denied, 266 U.S. 626; *Collins* v. *United States*, 157 F. 2d 409 (C.A. 9); *Bayless* v. *United States*, 147 F. 2d 169 (C.A. 8), reversed on other grounds, 150 F. 2d 236 (C.A.

explained by the district court, "To allow a defendant knowingly to sit on his rights and acquiesce in postponements of his trial, and then assert that delay as a ground for dismissal, would be tantamount to allowing him to turn a shield for his protection into a powerful sword" (P.A. 9a). The purpose of the privilege given by the Sixth Amendment is to enable an accused to secure an early trial, not to permit him to avoid trial altogether by sitting silent and later objecting to the delay. Delay benefits the defense as often as the prosecution, and a defendant who acquiesces in postponement presumably is willing to risk the possible disadvantages of delay for the possible benefits. There is no reason to relieve him of the consequences of that choice.

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8); *United States* v. *Research Foundation, Inc.*, 155 F. Supp. 650 (S.D. N.Y.); *Petition of Provoo*, 17 F.R.D. 183, 198 (D. Md.), affirmed, 350 U.S. 857. Most state courts have adopted the same view under similar provisions of state law. See Note, *The Right to a Speedy Criminal Trial*, 57 Col. L. Rev. 846, 853.

The views expressed by the district court in *United States* v. *Dillon*, 183 F. Supp. 541 (S.D. N.Y.), relied on by petitioner (Pet. 15, 19), have, of course, been rejected by the Second Circuit, not only in the *Lustman* and *Kaye* cases, *supra*, but in this very case.

There is no conflict of decisions[1] or other reason for review by this Court. The petition for certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
JOSEPH M. HOWARD,
LLOYD J. KENO,
Attorneys.

JUNE 1961.

---

[1] The question whether even a defendant who objects to a delay must show that he was prejudiced by it in order to upset a conviction—on which petitioner asserts there is a conflict (Pet. 10-11)—is not involved in this case, since the sole basis of the decisions below was that petitioner had waived any objection to the delay. Indeed, since the Second Circuit admittedly (Pet. 11) takes the view that, in such circumstances, a showing of prejudice is *not* required—*i.e.*, the view on that question most *favorable* to him—petitioner could not in any event urge a conflict with other circuits on that issue as a reason for the writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. [redacted] 92

JOHN VAN ALLEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

JESSE CLIMENKO,
Counsel for Petitioner,
360 Lexington Avenue,
New York 17, New York.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

JOHN VAN ALLEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

No. 970

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING

Petitioner respectfully moves for leave to file the annexed Petition for Rehearing of the order of this Court entered October 9, 1961, denying the petition for Writ of Certiorari in this case, Mr. Justice Douglas voting for the granting thereof.

Rehearing is sought at this time because, as is pointed out more fully in the annexed Petition

(1) the conflict continues to exist among the lower courts with respect to (a) the burden of showing "prejudice" from the government's failure to record a defendant's extrajudicial statement at trial, and (b) the effect of such a defendant's failure to move for a speedy trial upon his constitutional right thereto, and his right to assert it later in attacking his conviction

and

(2) petitioner is about to be deprived of his liberty on the evidence of a single witness that, some thirteen

years before the trial, petitioner had instructed him, orally, to omit certain transactions from petitioner's tax return, of which alleged instruction the witness admitted at the trial that (a) he had no independent recollection and (b) he had informed four different persons, on three separate occasions, some seven years previously, that petitioner had not given him any such instruction, and (c) as to which, when asked at the trial if he had testified truly to it, he answered: "No, I could have been mistaken".

It is respectfully submitted that the resolution of these conflicts, and the protection of the rights of the petitioner herein, call for a review by this Court.

October 23, 1961

JESSE CLIMENKO
Counsel for Petitioner

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays (1) that this Court grant rehearing of its order of October 9, 1961, denying the petition for Writ of Certiorari, Mr. Justice Douglas voting to grant the writ, and (2) that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case, as prayed for in the petition filed herein May 16, 1961.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

As we pointed out in the Petition for a Writ of Certiorari herein (p. 3), there was a lapse of upwards of thirteen years between the date of the offense and the date of trial.

The reasons assigned in the Petition in support of the granting of the Writ were (1) the conflict which exists among United States courts as to (a) whether or not it is incumbent on a defendant in a criminal case to show "prejudice" from the government's failure to accord him a speedy trial, and (b) whether or not such a defendant, by failing to move for an early trial, waives his constitutional right thereto and the right to assert it later in attacking his conviction (Petition, pp. 10-19), and (2) the unusual and extraordinary circumstances with respect to the testimony of the single witness upon whose evidence petitioner was convicted (id. pp. 3-9, 13).

The conflict among the courts of the United States, referred to above, continues apace; indeed, there is even a conflict between judges of the same court.

In *U. S. v. Kabot*, 185 Fed. Supp. 159 (U. S. D. C., S. D. N. Y.), District Judge Metzner held that the right to

a speedy trial is deemed waived if not promptly asserted, i.e. (p. 160):

> "In short, the defendant here must be held to have acquiesced in the delay by not taking prompt affirmative action in his own behalf to preserve his rights."

Judge Weinfeld, in the same Court, holds the contrary. Thus, in *U. S. v. Brown*, 188 Fed. Supp. 624, Judge Weinfeld said (p. 626):

> "The defendant, however, raises an issue of substance based upon a thirty-month delay from his arraignment on a complaint before a United States Commissioner until his indictment. The United States Attorney contends that the thirty-month delay is not per se ground for dismissal of the indictment, and further that the defendant, by failure to move to dismiss the complaint because of delay in presenting the matter to a grand jury, has, in effect, waived his right to a dismissal of the indictment on the ground that he has been denied a speedy trial under the sixth amendment. While there is respectable authority to support this position, this Court is not prepared to accept its implication that a constitutional right may be forfeited by inaction rather than by affirmative and intentional waiver or relinquishment. The constant rule adhered to by the Supreme Court requires that courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights.'"

In support of Judge Weinfeld's statement that there is "respectable authority" to support the contention of the United States attorney that defendant's failure to move to dismiss resulted in a waiver of his right to do so, Judge Weinfeld cited *U. S. v. Fassoulis*, 179 Fed. Supp. 645 (D. C. S. D. N. Y., 1959) and *U. S. v. Lustman*, 258 Fed. 2d 475 (2 Cir.) cert. den., 358 U. S. 880. On the other

hand, in support of his refusal to accept the implication of the aforesaid cases that a constitutional right may be forfeited by inaction, Judge Weinfeld cited *U. S.* v. *Dillon*, 183 Fed. Supp. 541; *Von Moltke* v. *Gillies*, 332 U. S. 708; *Glasser* v. *U. S.*, 315 U. S. 60; *Johnson* v. *Zerbst*, 304 U. S. 458; *People* v. *Prosser*, 309 N. Y. 353.

The United States Court of Appeals for the Second Circuit, as late as March 9, 1961, in *U. S. ex rel Buono*, 287 F. 2d, 534, 536, reasserted the rule of *Lustman*. Contriwise, in *U. S. ex rel Pierce*, 193 Fed. Supp. 395, the United States District Court for the Northern District of Indiana, noting (p. 399) the "well established" rule that the waiver of a constitutional right "is not to be lightly inferred," and that "Every reasonable presumption should and is indulged against a waiver of fundamental rights," held (p. 400) on the authority of *U. S.* v. *Dillon*, 183 Fed. Supp. 541, and *Petition of Provoo*, 17 F. R. D. 183, that the passage of time between the original conviction of petitioners and their second retrial constituted "an unreasonable delay," by which defendants were "prejudiced", and were "deprived of their constitutional right to both a speedy and fair trial".

In *U. S. ex rel Giovengo*, 194 Fed. Supp. 154 (March 27, 1961). District Judge McIlvaine, in the United States District Court, W. D. Pennsylvania, stated that the deferring of sentence for almost three years after entry of a plea of guilty in a state court was a violation of defendant's right of due process under the Fourteenth Amendment and (p. 157)

> "If this case with this delay had happened in the federal system, there is no question but what a constitutional right would have been violated."

Thus, the conflict among the lower courts continues.

We feel that on the application for the Writ, we did not adequately present the following facts:

Petitioner was convicted solely on the testimony of the Government's witness, Kubik, who had been retained by petitioner to prepare petitioner's income tax return for 1946, and to whom petitioner had turned over his books and records for that purpose (P. A. 15a, 17a).

Kubik testified that in making up his work sheets from the data so furnished to him by petitioner, Kubik inquired of petitioner—this was some 13 years before the trial—as to how to treat certain transactions reflected in the data petitioner had given him, and that petitioner had instructed him to omit them from the return (Id. 23a).

There is no other testimony connecting petitioner with the omissions for which he was convicted.

Kubik testified further that, after working on the matter, he suggested to petitioner that it be turned over to an accountant to complete, and this was done. Kubik thereupon delivered all petitioner's data to the accountant, and Kubik testified that if the accountant had properly checked it, the return would have been in proper form (P. A. 34a, 56a). However, because of the shortness of time, the accountant did not make an independent review of petitioner's data; instead, he merely had Kubik read off to him, from Kubik's worksheets, the figures which Kubid said were to be entered into the return, and the accountant so entered them (P. A. 29a, 30a, 33a-34a, 59a, 68a, 70a, 71a, 81a, 91a, 94a-95a; G. A. 55a, 56a, 58a, 83a-84a).

Kubik admitted that he had no independent recollection of petitioner's having told him to omit any transactions from petitioner's return; on the contrary, he admitted that in testifying that the omissions were based on petitioner's instructions he was merely stating an inference he drew from the fact that in examining his original worksheets [which he had not seen between the time he prepared them

en years previously and the time of his confer
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(P. A. 35a, 5 items notations reading "leave out", "omit"
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(Id. 45a, 64a, did Kubik admit that on three separate occa
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inwhich was delivered or received, which is re-
wlcorded on your work sheets, you did not tell us
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No. I could have been mistaken."
"A. *No*
e evidence on which petitioner is about to be
Such is the his liberty.
deprived of his

CONCLUSION

asons set forth above and in the Petition for a
For the reasiorari, it is respectfully urged that rehearing
Writ of Certiand that upon rehearing a Writ of Certiorari
be granted, anCourt of Appeals for the Second Circuit
is ue to the Cou

October 23, 1961

New York, Oct

Respectfully submitted,

JESSE CLIMENKO
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

JESSE CLIMENKO
Counsel for Petitioner